TAY AH KEE & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) July 31, 1962]

[Muar — Criminal Appeal No. 21 of 1962]

Gaming — Search — Entry into premises without search warrant — Common Gaming Houses Ordinance, 1953, s.16.

Criminal Procedure — Search — Police officer entering premises without search warrant — Whether exercising public function.

Criminal Law — Obstructing public servant — Whether obstructing police officer without search warrant an offence — Penal Code, s.186.

Under section 16 of the Common Gaming Houses Ordinance, 1953 no search can be conducted without a warrant issued in accordance with the provisions of that section. Therefore, a police officer cannot be said to be exercising his public functions if he is doing something that is not authorised by the law.

In this case a police inspector who is gazetted as senior police officer under the Common Gaming Houses Ordinance, 1953 on information received formed a search party and obtained entry to the accused's house, but when he came to try to search, he was obstructed by the accused who demanded to see his search warrant. The police officer had forgotten to issue it to himself.

Held: his search was not in accordance with the law, therefore the accused could not be convicted for an offence under section 186 of the Penal Code.

Cases referred to:—

(1) *Chai Fook* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 26.

(2) *Public Prosecutor* v. *Lee Sin Long* [1949] M.L.J. 51.

(3) *R.* v. *Vyankatrav Shrinivas* (1870), 7 B.H.C.R. cr. ca. 50.

MAGISTRATE'S CRIMINAL APPEAL.

F. Keith Sellar for the appellants.

Raja Azlan Shah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Adams J.: The facts of this appeal against the decision of the learned Magistrate, Batu Pahat convicting the three accused for the offence of voluntarily obstructing a public servant in the discharge of his public functions by preventing him from searching certain premises in Semerah Village on the 11th April, 1962, contrary to section 186 of the Penal Code are quite simple.

Inspector of Police Mohamed bin Haji Mohd. Noor is gazetted as a senior Police Officer under the Common Gaming Houses Ordinance, 1953, and on the 11th April at about 7.30 o'clock in the forenoon he received information relating to Gaming at Semerah Village. This information he very properly reduced to writing having sworn the informer. He then formed a search party and went to the accused's house at Semerah village. He obtained entry but when he came to try to search, he was obstructed by the accused who demanded to see his search warrant. Inspector Mohamed had forgotten to issue a search warrant to himself.

Mr. Keith Sellar appeared for the appellants and the Hon'ble Raja Azlan Shah, Legal Adviser, for the respondent, and both said that they had been unable to find any case on the particular point in the appeal that since the entry was illegal and there was no warrant to search, the Police Officer was not exercising his public functions because since gaming is not *mala per se* the statutory provisions under section 16 of the Common Gaming Houses Ordinance, 1953, had to be satisfied before any lawful entry could be made.

Mr. Sellar cited from *Ratanlal*, 20th edition at page 462, and the local cases of *Chai Fook* v. *Public Prosecutor* (1) and *Public Prosecutor* v. *Lee Sin Long* (2) and argued that since the act complained of was the prevention of a search, and since the statute prescribed that a search warrant under section 16 was a condition precedent to any search it was no offence to obstruct a police officer carrying out an illegal search.

Raja Azlan Shah argued that there is a general duty of a police officer to put down crime and cited the Police Ordinance, 1952, section 33(3) and *Gour* Penal Code, volume 1, page 892. He said that the entry may have been illegal but once they were in, it was still an offence to obstruct the police. He pointed out that articles seized in an illegal search could still form the basis of a prosecution under the Ordinance as indeed was said by Callow J. in *Public Prosecutor* v. *Lee Sin Long*, *supra*.

The passage from *Gour* from *R.* v. *Vyankatrav Shrinivas* (3) cited by the learned Legal Adviser is, with respect, not in point. There, the Court found that there was another provision of law which made his entry legal. In other words although his entry to search was illegal because of the lack of a warrant, the fact that he was also searching for a person suspected of having committed a cognisable offence by reason of the provisions of the law, made the entry legal. Such a situation does not arise here.

I think the crux of this case lies in the charge. The charge alleges obstruction to a search. Under section 16 of the Common Gaming Houses Ordinance no search can be conducted without a warrant issued in accordance with the provisions of that section. In my view a police officer cannot be said to be exercising his public functions if he is doing something that is not authorised by the law. His search here was not in accordance with the law, and I do not think that the accused can be convicted for resisting what was clearly an illegal act of the inspector of police.

The appeal must be allowed, the convictions of all accused quashed, and the fines if paid must be returned.

Appeal allowed.

Solicitors: *Sault, Keith Sellar & Co.*